ALIGNING SEBI'S INFORMANT MECHANISM WITH GLOBAL WHISTLEBLOWING STANDARDS: A PATH TO REGULATORY EXCELLENCE

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ABSTRACT

The role of whistleblowers in society is crucial. They highlight injustices that state authorities otherwise would not have known about if they ever would. This is the advantage of their intimate knowledge of the inner workings of the business they have worked for or are currently employed by. Whistleblowers are therefore crucial to upholding public ethics since they assist in exposing wrongdoings and putting sanctions and corrective measures in place. Whistleblowing is very beneficial for securities law enforcement efforts. Often, the only evidence used in these cases is circumstantial, which makes it difficult for regulators to gather without information from whistleblowers. By using the informant provision of the Regulations, whistleblowers can promptly alert SEBI to information about insider trading. Despite its best efforts, the procedure falls short ofmeeting worldwide best practices for whistleblowing on several fronts. First, it takes away an employee's ability to refuse to follow orders from a superior that they have reasonable suspicions are unlawful. Secondly, it unfairly puts the burden of proof on the informant to verify that the actions they are disclosing are incorrect. Thirdly, there is not enough guidance on how SEBI will keep the informant's identity private. Fourthly, the system omits provisions that would protect the families of informants from reprisals. Fifth, a protected person does not have the right to ask for a remedy against reprisal. Finally, it appears that a disproportionate quantity of evidence is needed to show retaliation, and the probability of success appear to be biased against the claimant.

I. INTRODUCTION

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Regarding the definition of "whistleblowing" and "whistleblower," there is no universal agreement. [1]Nonetheless, there appears to be considerable agreement regarding the legal meaning of the phrase.[2] "Whistleblowing" is defined as the following acts, according to a broad worldwide legal consensus:

(i) disclosing information about an alleged injustice by a current or former employee of an organization; (ii) by that corporation or within it; and (iii) to a government entity.[3] The person engaged in this behavior is referred to as a "whistleblower." Whistleblowers may occasionally appear under different names in legal records. Because of their former or current position within the company in question, the whistleblower possesses knowledge about the alleged wrong that is not widely known to the public. By engaging in whistleblowing, they inform a government official of this knowledge. This notifies the appropriate government authorities of a potential infraction and gives them the ability to begin taking enforcement measures to deal with the fallout from the behavior and/or apply fines. The role of whistleblowers in society is crucial. They highlight injustices that would otherwise be difficult, if not impossible, for government representatives to discover.[4] This is the advantage of their intimate knowledge of the inner workings of the business they have worked for or are currently employed by. Whistleblowers are therefore crucial to upholding public ethics because they significantly boost the discovery of wrongdoings and the application of sanctions and corrective measures against them.[5] Numerous court decisions have recognized that both the activities of whistleblowers and the act of whistleblowing itself serve the public interest.[6] Whistleblowing is entitled to protection by the State since it is recognized as a kind of speech under the freedom of speech and expression.

When the advantages of disclosure outweigh the risks and there is no realistic method to remedy the behavior that is being exposed, whistleblowers have the right to be safeguarded against reprisal, whether from the State or another private party. The whistleblower in this case has the right to sue for remedies under human rights or constitutional law in the event of retaliation. In the context of securities legislation, whistleblowing is especially useful as a weapon for securities market regulation

[1] https://www.oecd-ilibrary.org/docserver/gov_glance-2015-36-en.pdf?expires=1727449024&id=id&accname=guest&checksum=8C6B67DC68B0EA0705D7D8BCFBB51A0E.

[2] OECD (n 1); UNODC (n 1).

[3] https://www.whistleblowers.org/wp-content/uploads/2018/10/un-convention-article-33.pdf.

[4] https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55.

[5] WB principles_main, (Sept. 23, 2013), https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf.

[6] Indirect Tax Practitioners Association v R K Jain (2010) 8 SCC 281 (India)

that adheres to the ideals of free market ethics, which support preserving level playing fields for all participants.[7] Experience has demonstrated that while pursuing enforcement actions for violations of securities laws, a substantial quantity of circumstantial evidence is used. [8] Thirteen By definition, circumstantial evidence is extremely difficult to locate and obtain without the help of an insider who is familiar with the subject of the investigation.[9] Because of this, enforcing securities enforcement procedures is more challenging to prosecute than regular felonies and other violations where the weight of evidence is not as great. Consequently, having a whistleblower with inside knowledge of a violation of securities laws is quite beneficial. Consequently, it is not surprising that regulatory bodies that monitor global financial markets have established avenues for informants to notify them of such violations. These agencies, in particular the US Securities and Exchange Commission, have had significant success prosecuting violations of securities law based on information received via their whistleblower programs.[10] From an ethical perspective, whistleblowing benefits society. It makes logical to implement regulations that can promote the reporting of misconduct as a result. These can be created by instituting a whistleblower procedure. There seem to be two primary challenges facing any structure intended to safeguard whistleblowers. Whistleblowing must be a successful act first and foremost.[11] Whistleblowing is only deemed socially useful when material is discovered that a government authority can legally use to initiate an enforcement action. Obviously, disclosures of this nature have to meet a certain standard of quality. Second, even while it's morally right to expose misconduct, doing so puts reporters at risk of becoming victims themselves. A whistleblower, by definition, notifies the authorities of any activity that could have repercussions for their organization. It is therefore not surprising that the employer regularly uses their power to retaliate against the whistleblower, given that the employer and whistleblower are still in an employment relationship.

Therefore, it is widely agreed upon that measures for protecting whistleblowers from being victimized for their actions must be created.[12] Therefore, the aim of a good whistleblower process should be to maximize the attainment of these two policy objectives. Indian securities laws did not provide whistleblower protection for a very long time. Therefore, an effective enforcement instrument was lacking. A whistleblower system was added to the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 in an amendment made in 2019. With this update, SEBI introduced Chapter III-A to these regulations. The Chapter establishes an informant structure so

[7] https://www.sec.gov/news/speech/1993/113093beese.pdf.
[8] SEC.gov, Request Rate Threshold Exceeded https://www.sec.gov/news/speech/speecharchive/1998/spch221.htm.
[9] https://bettermarkets.org/wp-content/uploads/2022/01/BetterMarkets_Report_SECs_Whistleblower_Program_January_2022.pdf.
[10] SEC.gov, Request Rate Threshold Exceeded https://www.sec.gov/newsroom/speeches-statements/chair-white-remarks-garrett-institute.
[11] https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55.

[12] WB principles_main, (Sept. 23, 2013), https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf.

that suspected cases of insider trading can be reported to SEBI. It contains provisions about compensating informants, protecting the identity of the informant in confidence, and reporting protocols.[13] Through a critical examination of the informant process established by the Regulations, this essay seeks to close that gap. The informant system does not adhere to global best practices for efficient whistleblower techniques, according to the author's theory. The literature lacks a comprehensive, critical evaluation of how successfully the informant system created by these legislation achieved the objectives of sound policy for whistleblowing. The research that is currently available on the informant mechanism seems to be composed solely of brief observations, and none of them outline the criteria used to evaluate the mechanism.[14] The second section of the paper outlines the best practices for creating an effective whistleblower system. These best practices were derived from the most successful whistleblower procedures that have been seen all throughout the world. The author examines the characteristics of the informant mechanism as outlined in the Regulations in Part III and assesses how well those characteristics align with the recommended practices discussed in Part II. Part IV concludes with a summary of the author's results, a test of the hypothesis, and recommendations for improving the efficacy of the informant mechanism.

II. HOW TO DEVELOP A GOOD WHISTLEBLOWER MECHANISM: LESSONS FROM THE WORLD

The strategies used by whistleblowers have been extensively researched globally and documented in a substantial corpus of reliable literature. The most effective techniques for creating a successful whistleblower system, drawn from worldwide experience, are included in each of these volumes. A joint report from the Government Accountability Project and the International Bar Association is among the most thorough investigations on this topic.[15] Comparable to this, research outlining international best practices for creating whistleblower systems has been released by the G20 Anti-Corruption Plan. Best practices for creating an effective whistleblower process are outlined in a resource guide released by the UN Office on Drugs and Crime (UNODC). The manual is based on a global analysis of whistleblower procedures. These texts all provide advice that is largely consistent.[16] The author will provide a brief explanation of these suggestions in this section. For clarity, the author

[13] The Securities and Exchange Board of India (Prevention of Insider Trading) Regulations 2015.
[14] SEBI's Informant Mechanism: Impact of the Incentives on Internal Compliance Programs, NLIU CBCL (Aug. 1, 2020), https://cbcl.nliu.ac.in/capital-markets-and-securities-law/sebis-informant-mechanism-impact-of-the-incentives-on-internal-compliance-programs/.
[15] https://www.ibanet.org/MediaHandler?id=49c9b08d-4328-4797-a2f7-1e0a71d0da55.
[16] Resource Guide on Good Practices in the Protection of Reporting Persons, (Aug. 12, 2015), https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf.

has broken down the advice into three stages: pre-disclosure, during disclosure, and post-disclosure. These phases correspond to multiple components of the typical whistleblower procedure.

III. BEST PRACTICES IN PRE-DISCLOSURE STAGE

Prior to the whistleblower disclosing their identify, a formal procedure serves a crucial purpose. Policies associated with this stage promote effective whistleblowing. The best practices for developing the pre-disclosure stage are listed below, in no order.

A. Definition of Protected Disclosures

The first obstacle to developing an effective plan is figuring out what constitutes whistleblowing and who can do it. There are two steps to this method. We first list the kinds of wrongs for which whistleblowing is permissible. This ought to be as inclusive as is reasonable. Second, "whistleblowing" should be defined as any circumstance in which a whistleblower divulges information that gives rise to a reasonable suspicion that any of those wrongdoings have happened, are happening, or are likely to happen. Conversely, the weakest criteria to apply is good faith (rather than a solid basis for belief). In addition to the difficulties arising from their identification, the whistleblower is burdened with a significant evidentiary burden by the duty to exhibit good faith. Whistleblowing is hence discouraged. a "reasonable basis to believe" that the standard is better since it allows reporters to make "honest mistakes" and at the same time promotes the disclosure of any material that a regulator would find useful.[17]

B. Definition of Employee

As was previously mentioned, the legal definition of whistleblowing usually limits the sharing of information to "employees." This phrase should be interpreted broadly by whistleblower procedures so that they cover not just ordinary workers but also individuals in quasi-employment relationships like interns, contractors, probationers, etc. Everyone who is as likely as regular employees to have inside knowledge of possible wrongdoings due to their proximity to the organization's internal processes should be included in the scope of the expansion.[18]

C. Right to Refuse Violation of Law

Supervisors frequently have the authority to order subordinates to take actions that may be illegal. When an employee has good grounds to believe they are being told to perform something illegal, they are always entitled to the following rights: (i) the freedom to decline instructions; and (ii) defense

[17] WB principles main, (Sept. 23, 2013), https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf.

[18] 410 Gone, https://classic.austlii.edu.au/au/legis/cth/consol_act/pida2013295/s10.html, XIII-804 Republic of Lithuania Law on the Protection of Whistleblowers, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/267de1c2a9b911eb98ccba226c8a14d7, EUAlbertina-Regu, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937.

against repercussions should they decide to do so. An employee may occasionally need to seek advice from a specialist, such as a lawyer, regarding the legality of the in-issue behavior. In that instance, the same safeguards must be in place for however long it takes to get such counsel.[19]

D. Ban on "Gag Orders"

Any clause in a statute or contract that prohibits whistleblowing or specifies the penalties for doing so ought to be interpreted as unenforceable. It's not too difficult to verify this. Any rules that protect whistleblowers must be absolute and take precedence over any clauses that function as "gag orders."

IV. BEST PRACTICES IN THE DISCLOSURE STAGE

The most crucial part of the entire process is the disclosure step, where the whistleblower really "blows the whistle" by disclosing information. This step needs to be carefully designed because the final architecture could either support or contradict a whistleblower procedure. The following list, which is not sequential, contains the suggested practices for creating the disclosure stage.

A. Identity Protection

A lack of identity protection can largely discourage whistleblowers. identify protection can be achieved in two ways: (i) confidentiality, where the government agency receiving the information is not aware of the identity of the whistleblower; or (ii) anonymity, where the government agency is aware of the identity of the whistleblower but chooses to keep it a secret from the public. Information that could be used to indirectly identify the whistleblower must be kept secret in addition to the person's direct identification (name, address, title, etc.). Without their permission, the authorities are unable to identify the whistleblower. Without their permission, the authorities are unable to identify the whistleblower. Without their permission, the authorities are unable to identify the whistleblower. If the authority chooses to adopt a paradigm that permits it to reveal identity without agreement, it should warn the public well in advance and have a clear policy guiding identification disclosures.

B. Interim Relief

Another tactic to keep a whistleblower safe from retaliation is to provide them a little reprieve. Determining whether a whistleblower retaliation action is justified may take some time. The whistleblower will be left on their own and may face retaliation if a temporary solution is not found. Because of this, the lack of a short reprieve effectively encourages whistleblowers by allowing the negative effects of retaliation to occur. Therefore, a mechanism for temporary relief must be included

[19]Service unavailable, (Sept. 27, 2000), https://www.legislation.govt.nz/act/public/2000/0007/latest/DLM2033054.html.

in all whistleblower schemes. The framework ought to facilitate numerous equitable and common law reliefs.[20]

IV. Best Practices in the Post-Disclosure Stage

Lastly, the reach of a good system never ends, even after the whistleblower has revealed everything. The best practices for developing the post-disclosure stage are listed below:

A. Rewards

Incentives are the most fundamental language that all people can comprehend. Consequently, in the event that nothing else changes, the possibility of financial gain will motivate whistleblowers to provide more information. Because of this, a whistleblower system might pay informants. The amount of the award in the event that an enforcement action is successful is typically tied to the financial penalty that the concerned regulator was able to obtain.

B. Protection against Retaliation

The definition of the scope of retribution is governed by three key concepts. Initially, it seems like the options for taking revenge are "limited only by the imagination." As a result, a whistleblower system needs to define punishment broadly. To put it simply, it is critical to criminalize any form of discriminatory conduct associated with the act of whistleblowing, be it actual, threatened, or indicated. The consequences could not necessarily be limited to the relationship between an employee and a whistleblower at work. Any form of retaliation, including harassing family members, filing civil lawsuits, going to jail, and other non-work-related acts, need to be prohibited. Second, it's important to realize that, in addition to the employer, other parties may also seek retribution. These third parties might not necessarily be associated with the employer or even operating with their permission. For example, a mistaken sense of loyalty to the company may cause the whistleblower's co-workers to become hostile without any provocation from the employer. Thirdly, individuals often misidentify someone else as the true source and attack them for retaliation in their rush to uncover the whistleblower. [21]As such, it is critical to protect from retaliation any employee who is, or could be perceived as, a whistleblower or who provides assistance to a whistleblower. In the end, retaliation against the family members of those who are protected is almost as serious as retaliation against the protected individuals.[22]

[20] Article 21 Measures for protection against retaliation, Better Regulation (Dec. 27, 2024), https://service.betterregulation.com/document/413662.
[21] 410 Gone, https://classic.austlii.edu.au/au/legis/cth/consol_act/pida2013295/s13.html, PUBLIC INTEREST DISCLOSURE ACT 2013, s 13, No. 133, Acts of Parliament, 2013
[22] XIII-804 Republic of Lithuania Law on the Protection of Whistleblowers, https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/267de1c2a9b911eb98ccba226c8a14d7, The Republic of Lithuania 2017, art 10(3), No. XIII-804, 2017

C. Reverse Burden of Proof for Retaliation Claims

The "reverse" burden of evidence, first introduced by the USA in its Whistleblower Protection Act, 1998, is now the "gold standard" for whistleblower retaliation claims globally.This criterion will make it comparatively simple for whistleblowers to prove accusations of retaliation. By this standard, the employer is required to show that the conduct in question cannot be connected to the whistleblower's disclosure by providing "clear and convincing evidence," an evidentiary standard that is higher than "preponderance of probabilities" but lower than "beyond reasonable doubt." The whistleblower must also immediately establish a prima facie case of retaliation.[23]

V. THE INFORMANT MECHANISM UNDER THE SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015

A. Evolution

In its 117th Report, the Law Commission recommended the adoption of a global law to promote whistleblowing and protect those who do so from retaliation as early as 2001[24]. That's why the report has a draft bill attached. Publicly issued in 2007, the Fourth Report of the Second Administrative Reforms Commission recognized the value of whistleblowing and recommended legislation to protect informants from retaliation. In reaction to the crisis surrounding the death of "grand corruption" whistleblower Satyendra Dubey, and in line with the Law Commission's recommendations, the Central Government set up a whistleblower system under the Central Vigilance Commission (CVC). Notably, an executive resolution that was published in Indian Gazette carried out this[25]. At the time, and to this day, no statute has endorsed it. The Whistleblower Protection Bill of 2011 represented the first attempt to enact a broad whistleblower statute[26]. After being discussed in Parliament's Houses of Committees, the Whistle Blowers Protection Act of 2014 was passed. It's interesting to note, though, that even eight long years, the Central Government has still not declared the Act to be law.

Consequently, India does not currently have a general whistleblower statute as of 2022. In 1999, SEBI established the K.M. Birla Committee on Corporate Governance. To implement these suggestions, SEBI employed a regulatory framework that is exchange-driven.[27] The study directed stock exchanges

[23] EUAlbertina-Regu, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937, EU Whistleblower Protection Directive 2019, Art 21, No. 1937, Act of European Parliament, 2019

[24] Ulysses R Gotera, Report on the Public Interest Disclosure Bill 2001, (Jan. 13, 2003), https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081062.pdf.

[25] (Jan. 9, 2007), https://documents.doptcirculars.nic.in/D2/D02ser/AVD_III_06_11_2006.pdf.

[26] The Whistle Blowers Protection Bill, 2011, (Aug. 26, 2010), https://prsindia.org/billtrack/the-whistle-blowers-protection-bill-2011

[27] (July 26, 2004), https://www.nfcg.in/UserFiles/kumarmbirla1999.pdf.

to incorporate the recommendations of the research as obligations owed by listed companies in Clause 49 of the Listing Agreement, which is a regulated document that all companies wishing to list with stock exchanges are required to sign.[28] Clause 49 was entirely revised by SEBI in 2004, and the exchanges received guidance on how to apply the revised language. Although it did not require it, it recommended listed companies to establish an internal whistleblower mechanism that would be supervised by the Board of Directors' Audit Committee[29]. The statutory form for the duties under Clause 49 of the Listing Agreement was subsequently provided by the SEBI (LODR) Regulations, 2015.84 2019 saw the first public announcement of SEBI's plan to establish an external whistleblower channel that would enable information to be reported directly to SEBI. By publishing a discussion paper on the suggested strategy, SEBI sought input from the general public[30]. Later that year, SEBI introduced a new Chapter III-A by amending the Regulations (89). It consists of incentives for the informant, a reporting system, and safeguards for the identity of the informant. 91 The scope of this technique is limited to disclosures related exclusively to insider trading.92 To date, no other organization has a procedure similar to SEBI's for reporting any further breaches of securities rules. In this section, the author has critically analysed and broken down each of the main clauses of the Regulations' informant mechanism, using the global best practices for developing whistle blower systems as a guide.

B. Gag Orders and Right of Refusal

The Regulations clearly declare void any provision in a contract that forbids anybody other than an advocate from disclosing the informant mechanism. This completely conforms to the global standard protocol for preventing "gag orders." International best practices state that unless a court rules otherwise, every employee should have the legal right to abstain from behaving in a way that they logically believe to be unlawful. [31]However, this privilege is not mentioned in any way in the Regulations. To that extent, the Regulations do not conform to worldwide best practices.

C. Informant Definition

The Regulations define a "informant" as an individual who discloses information about an insider trading violation that either (a) has occurred already, (b) is happening right now, or (c) the informant

[28] Sebi, Corporate Governance (Feb. 28, 2000), https://www.sebi.gov.in/legal/circulars/feb-2000/corporate-governance_17930.html.
[29] Sebi, Corporate Governance (Oct. 28, 2004), https://www.sebi.gov.in/legal/circulars/oct-2004/corporate-governance-in-listed-companies-clause-49-of-the-listing-agreement_13153.html.
[30] Sebi, Discussion Paper on amendment to the SEBI (Prohibi (June 20, 2015), https://www.sebi.gov.in/reports/reports/jun-2019/discussion-paper-on-amendment-to-the-sebi-prohibition-of-insider-trading-regulations-2015-to-provision-for-an-informant-mechanism_43237.html.
[31] WB principles_main, (Sept. 23, 2013), https://images.transparencycdn.org/images/2013_WhistleblowerPrinciples_EN.pdf.

has a reasonable suspicion is likely to occur. [32] It should be observed that the reasonable belief criterion only applies to the third limb of the definition; the previous two are unaffected. Therefore, information about an actual violation of insider trading regulations, whether past or present, must be disclosed by a whistleblower in order for them to be considered an informant under the Regulations. The informant now bears the responsibility of confirming that the information they submitted is connected to activities that genuinely contravene insider trading laws. First and foremost, the informant needs to satisfy themselves because they are unfit to respond to a legal question. As a result, they will need to pay for professional guidance, which they have to do. Secondly, and maybe more importantly, an expert's opinion is rarely conclusive. SEBI has the last say when it comes to violations. It is quite conceivable for SEBI and the concerned expert to get to different conclusions, even in cases where everyone is acting logically and with good intentions. This increases the informant process's level of uncertainty significantly. Important information may not be disclosed by certain whistleblowers due to the resulting unpredictability and increased costs. The burden this approach throws on the whistleblower is incompatible with the global best practice, which requires them to only demonstrate that they have a reasonable belief that the information they have supplied relates to a breach.

D. Identity Protection of Informant

When revealing the informant mechanism, the informant has two options: (i) they can submit the disclosure on their own; or (ii) they can submit it through an advocate, a "legal representative" authorized to practice law in India[33]. The informant must disclose their identity if they only submit one file. When the disclosure is filed through an advocate, an additional layer of quasi-anonymity is added, which only SEBI has the authority to remove. The advocate must verify the identity of the informant prior to filing; nevertheless, the advocate is not permitted to disclose the informant to SEBI unless specifically directed by SEBI. 101 The opportunity to name a trustworthy ally as the "gatekeeper" of their identity is thus granted to the informant. The identity protection framework, however, has two major shortcomings: (i) the regulations do not give sufficient instructions on how SEBI will handle identifying information in the disclosure form; and (ii) the framework on confidentiality and non-consensual disclosures is not detailed enough to motivate and inspire whistleblowing. To the extent that it is practicable, the informant may remove identifying information from the disclosure form. If it is not practical, they may specifically define the particular information

[32]Sebi, Discussion Paper on amendment to the SEBI (Aug. 5, 2021), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-_41717.html, SEBI (Prohibition of Insider Trading) Regulations, 2015, No. LAD-NRO/GN/2014-15/21/85, Regulation 7A(b), 2015

[33] Sebi, Discussion Paper on amendment to the SEBI (Aug. 5, 2021), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-_41717.html, SEBI (Prohibition of Insider Trading) Regulations, 2015, No. LAD-NRO/GN/2014-15/21/85, Regulation 7B(1), 2015.

in the form that is identifying. Global best practices recognize that: (a) if non-consensual disclosure is allowed by law, there must be a well-established and well-known protocol to regulate such disclosures; and (b) confidentiality should ideally never be violated without the informant's consent. [34]The Regulations don't provide enough guidance regarding SEBI's stance on non-consensual disclosures. Broad discretionary powers like those granted to SEBI under the informant mechanism hardly meet that requirement.

E. Protection against Retaliation

Whistleblowers are protected from retaliation by several provisions in the Regulations. However, these provisions fall short of global best practice for four reasons: (i) the Regulations do not apply the "reverse" burden of proof, which is widely regarded as the gold standard in retaliation claims; (ii) the burdensome causal link that must be shown between a whistleblower's actions and the employer's discrimination; (iii) most critically, there appears to be no true remedy against retaliation; and (iv) finally, the protection of "insiders" outside of employment relationships is not covered by the scope of protected persons.

The provisions provide protection to the following individuals: (a) any employee; (b) any employee of an intermediary or listed firm; and (c) any person who discloses the informant mechanism.[35] The term "employee" refers only to directors, partners, regular employees, contractual employees, and anybody else having a job relationship with the listed company or the relevant intermediary. The global best practice is to extend the protection from retribution to any family members of "insiders" and to anybody else who might have access to inside information about a wrong (including those without formal job ties, such as interns, consultants, probationers, etc.). [36] "Insiders" and their families are not protected by the regulations when they are not connected to a workplace.

The definition falls short of worldwide best practices in that regard. Specifically covered are "discharge, termination, demotion, suspension, threats, and harassment," among other direct and indirect types of retribution. Furthermore, there is no clear limit to the retaliation, and it can involve any form of "discrimination." In this way, the term is consistent with the global norm, which gives vengeance a vague meaning. However, it doesn't seem like the definition explains the required causal

[34] (Nov. 10, 2021), http://bdlaws.minlaw.gov.bd/upload/act/2021-11-17-11-39-54-40.The-Dsclosure-of-Public-Interest-information-(Protection)-Act--2011.pdf, The Public Interest Information Disclosure (Provide Protection) Act 2011, Section 5, No. 254, Ministry of Law, Justice and Parliamentary Affairs, 2012; EUAlbertina-Regu, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937, EU Whistleblower Protection Directive 2019, Art 16, No. 1937, Act of European Parliament, 2019

[35] Sebi, Discussion Paper on amendment to the SEBI (Aug. 5, 2021), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-_41717.html, SEBI (Prohibition of Insider Trading) Regulations, 2015, No. LAD-NRO/GN/2014-15/21/85, Regulation 9(1), 2015.

[36] EUAlbertina-Regu, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937, EU Whistleblower Protection Directive 2019, Art 5,19 & 21, No. 1937, Act of European Parliament, 2019

relationship between the employer's conduct and the informant's disclosures. Only three situations qualify as "because of" discrimination against an employee: (a) revealing information through the informant system; (b) backing SEBI in a court case; or (c) going against an employment contract that prohibits the employee from aiding SEBI. [37] The term "because of" usually implies that the three listed events were the primary or dominating cause of the discrimination in question, or at the at least, that they were the only possible reason for it. This is against international best practices, which state that the conduct of the whistleblower should not be the primary or dominant reason of the prejudice, but rather merely a relevant cause, or a contributing element. This method, which puts an undue burden on the whistleblower by requiring them to demonstrate a "primary/dominant" or "sole factor," is inappropriate since it makes it impossible for them to establish the requirements of a retaliation claim.

The Regulations provide a legal remedy for retaliation. If a listed company or intermediary retaliates against an employee, SEBI is authorized by securities legislation to take enforcement action against them. However, there are two reasons why this approach looks totally ridiculous when examined more closely. First off, this most crucial phrase is in jeopardy since it seems that these measures go outside the boundaries of the SEBI Act. The SEBI Act stipulates that the Regulations must be approved as subordinate law by SEBI under its quasi-legislative jurisdiction. [38] Regulations may be adopted by SEBI to "carry out the purposes of [the] Act," but they cannot be in conflict with the Act, or any rules enacted under it. [39] The Act's goals are limited to two things: (a) protecting investors' interests in securities; and (b) controlling and promoting the expansion of the securities market. SEBI requires the vital information that whistleblowing by itself gives to maintain the integrity of the securities market. However, there is less of a connection between securities market regulation and the enforcement of anti-retaliation remedies. Consequently, the two have a causal link. Therefore, the contested portion is unrelated to the goals of the Act. Because it is outside the purview of the parent Act, it appears to be void. Second, the employee doesn't seem to have a consistent means of getting even, even in the worst-case situation. In compliance with the Regulations, the employee may bring a claim for relief from retaliation under other statutes. As of right now, no other statute provides a comparable level of protection against retribution. In a civil case, the employee may potentially claim that their statutory protection against retaliation—which comes from the Regulations—is enforceable. Statutory bare

[37] Sebi, Discussion Paper on amendment to the SEBI (Aug. 5, 2021), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-_41717.html, SEBI (Prohibition of Insider Trading) Regulations, 2015, No. LAD-NRO/GN/2014-15/21/85, Regulation 7I(1); 2015.

[38] *Shri Sitaram Sugar Co Ltd v Union of India* AIR 1990 SC 1277 (India)

[39] Securities And Exchange Board Of India Act, 1992, (Feb. 25, 2016), https://www.sebi.gov.in/sebi_data/attachdocs/1456380272563.pdf, Securities And Exchange Board Of India Act 1992, Sec 30, Act of Parliament, 1992

rights and obligations are usually regarded as civil in nature[40]. However, even in that case, the SEBI Act exceeds civil court power and would specifically prohibit the worker from bringing a civil lawsuit to defend that entitlement. As they say, a right without a remedy is not worth the paper it is written on.[41]

Finally, there is absolutely no mention of the burden of proof in retaliation cases in the Regulations. This clearly conflicts with the global best practice in this regard, which is to impose a "reverse" burden of proof.

E. Rewards Mechanism

The Regulations create an incentive program under the informant mechanism. Informants who provide special information that leads to a successful enforcement action may be eligible for rewards. The Board may, in its sole discretion, declare as a prize up to 10% of the disgorgement amount that SEBI imposed on the wrongdoer in that enforcement action, with a maximum of ₹ 10 crores. [42]The incentives scheme seems to be compliant with the global standard practice, which stipulates that the whistleblower should receive discretionary payment equivalent to the fines the government is able to collect from them in a case brought about by their disclosure.126

VI. CONCLUSION

With regard to the informant process, SEBI appears to be doing appropriately. Its discussion paper, which was published before the informant system was implemented, generally shows a good understanding of the significance and essential elements of an effective method for securities market authorities to receive whistleblower reports.[43] Regulating doesn't seem to have accomplished this goal, though. The resultant informant system has several shortcomings that significantly reduce its effectiveness. The informant system deviates from global best practices for setting up effective channels for leaks on these matters. It seems that my hypothesis regarding the incompatibility of the informant technique with global best practices is accurate.

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[40] *SEBI v Cabot International* (2005) 123 Comp Cas 841 (Bom) (India)

[41] Securities And Exchange Board Of India Act, 1992, (Feb. 25, 2016), https://www.sebi.gov.in/sebi_data/attachdocs/1456380272563.pdf, Securities And Exchange Board Of India Act 1992, Sec 15Y, Act of Parliament, 1992

[42] Sebi, Discussion Paper on amendment to the SEBI (Prohibition of Insider Trading (Aug. 5, 2021), https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-prohibition-of-insider-trading-regulations-2015-last-amended-on-august-05-2021-_41717.html, SEBI (Prohibition of Insider Trading) Regulations, 2015, No. LAD-NRO/GN/2014-15/21/85, Regulation 7D(1), 7E(1); 2015.

[43] Sebi, Discussion Paper on amendment to the SEBI (Prohibition of Insider Trading (June 20, 2015), https://www.sebi.gov.in/reports/reports/jun-2019/discussion-paper-on-amendment-to-the-sebi-prohibition-of-insider-trading-regulations-2015-to-provision-for-an-informant-mechanism_43237.html.

In conclusion, I draw attention to the instances in which the informant system deviates from global best practices and provide my recommendation for filling in those gaps by bringing the Regulations into line with these standards:

VII. DRAWBACKS

- An employee cannot legally refuse to accept a command from a superior that they reasonably believe to be unlawful until they obtain a court verdict on the matter.
- The only insider trading rules-related information that can be covered by a protected disclosure is that which: (a) "has occurred," (b) "is occurring," or (c) the informant has a "reasonable belief... is about to occur".
- SEBI's handling of information indicated as identifiable on the disclosure form is not sufficiently clarified under the Regulations.
- Protecting "insiders" who are not associated with an employer and "insiders'" relatives are the only categories not protected from retribution.
- To protect the employee from retaliation, the employer must show that the person's whistleblowing was the primary cause of the discrimination against them.
- There doesn't seem to be a real method to stop retaliation because the section about anti-relation remedies seems to be outside of SEBI's quasi-legislative jurisdiction.
- The employee is responsible for providing as much evidence as possible to support their claim that they were the target of retaliation.

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RECOMMENDATIONS

- It is recommended that SEBI, which has regulatory authority, offer this privilege to all workers oflisted companies, intermediaries, and other market players at work.
- Expand the idea to protect the disclosure of any data that an informant reasonably believes relatesto a past, present, or future violation of insider trading violations.
- Ensure that SEBI clarifies how distinct handling procedures will be applied to identifying and non-identifying information. There are several broad, arbitrary exceptions to SEBI's general obligation to protect the confidentiality of the informant's identity. It might not be feasible to remove the general obligation of confidence's exceptions or to grant SEBI no discretion in that area. Consequently, it would be better to: (i) restrict the number of exceptions to what is absolutely required, and (ii) making sure the Regulations contain enough specific guidance to ensure that an informant can accurately comprehend the scope of the exclusions.
- Extend the concept of protected persons to encompass the following: (a) individuals who may possess insider knowledge regarding a wrong; this encompasses non-employer-affiliated individuals such as interns, consultants, probationers, etc.; and (ii) their families.
- The employees should simply have to prove that their employer's reporting of the discrimination was a "contributing factor"—that is, a pertinent reason, but not always the primary cause.
- Adding a new provision to the SEBI Act that would allow SEBI to punish whistleblowers fordisclosing information through the informant mechanism is one way to go about it.
- When it comes to claims of retaliation, place the entire "reverse" burden of evidence on the employee, following the generally recognized "gold preponderance of probabilities" standard.